

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





76-2028

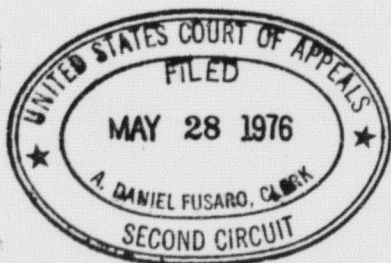
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
NEVIN MAWHINNEY, :  
Appellant, :  
-against- :  
ROBERT J. HENDERSON, Superintendent, :  
PETER PREISER, Commissioner of :  
Corrections, and NORRIS, Lieutenant, :  
Appellees. :  
-----X

No. 76-2028

B  
pls

APPENDIX



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ELLEN J. WINNER  
Attorneys for Plaintiff-  
Appellant  
The Legal Aid Society  
Prisoners' Rights Project  
15 Park Row  
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PAGINATION AS IN ORIGINAL COPY

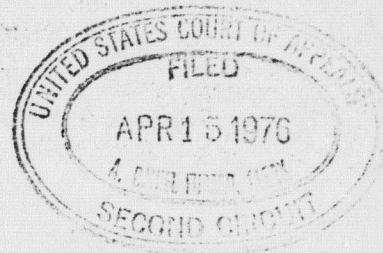


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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT



NEVIN MAWHINNEY  
Plaintiff-Appellant

vs

ROBERT J. HENDERSON, et al  
Defendant-Appellee

Northern District of  
New York  
Civil No. 75-CV-97

I N D E X

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76-2028







-CV-97

DATE	NR.	PROCEEDINGS
1975		
Feb. 27	1	Filed civil rights complaint
" 27	2	" Memorandum-Decision and Order (2/26/75) dismissing complaint and directing same be filed without fee-SO ORDERED-HON.JAMES T. FOLEY.
" 27	3	" judgment
April 2	4	" Notice of Appeal
July 22		Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
July 31	5	Filed receipt of papers from C.C.A.
Dec. 15	6	Filed Decision of C.C.A. that the appeal from the order of this district court is dismissed for failure to file a timely notice of appeal and it is further ordered that the case is remanded to this district court for a determination on the issue of excusable neglect
Dec. 17		Received all papers from C.C.A.
Dec. 19	7	Filed copy of letter from Judge Foley to Mr. Nevin Mawhinney
1976		
Jan. 5	8	Filed Memorandum of Law in support of Plaintiff's Motion for an extension of time in which to file his notice of appeal
Jan. 5	9	Filed Notice of Motion, returnable Jan. 19, 1976 at Albany for an order extending plaintiff's time for filing his notice of appeal until April 2, 1975, Affidavit by Ellen J. Winner & exhibits
Jan. 16	10	Filed Affidavit in opposition by Timothy F. O'Brien
Jan. 19		Adjourned to 2/2/76 by consent
Feb. 3		Motion for an Order extending plaintiff's time for filing his Notice of Appeal until April 2, 1976-Decision Reserved
Feb. 5	11	Filed Memorandum-Decision and Order of Judge Foley (2/4/76) granting the motion for extension of time to file plaintiff's notice of appeal until April 2, 1976, etc.



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT  
N. D. OF N. Y.  
*FILED*

JAN 14 1975

AT O'CLOCK M.  
J. R. SCULLY, Clerk  
UTICA

NEVIN MAWHINNEY

X

PLAINTIFF

X

V.

X

Robert J. Henderson Supt A.C.F.

X

Peter Priester Comm. Gen.

X

Norris Lt. A.C.F.

X

DEFENDANTS.

X

X

APPLICATION IN FORMA PAUPERIS

75-CV-097

I, Nevin Mawhinney

being duly sworn, dep

and says: I am entitled to and intend to commence a Civil Action against the abo  
named defendants. The nature of this action is: The denial of my <sup>Rights under the</sup> First, Eighth  
and Fourteenth Amendments to the United States Constitution, in that petitioner  
was denied the right to worship in the religion of his choice which is Protestant  
and was denied equal protection and the <sup>due</sup> process of law.

I believe I am entitled to the redress sought herein, because as a matter  
of Constitutional right and as more fully shown in the verified complaint filed  
here with.

Because of my poverty I am unable to pay the cost and fees incurred or to give security therefore.

Wherefore, plaintiff prays that he may have leave to prosecute this action in Forma Pauperis pursuant to Title 28, U.S.C. 1915.

Sworn to me before this

10 day of January 1975

*Dorothy J. Burns*

DOROTHY J. BURNS  
Notary Public, State of New York  
No. 1432  
Qualified in Cayuga County  
Commission Expires March 30, 1976

Respectfully Submitted

*Kevin McQuinn*  
Kevin McQuinn  
135 State Street  
Auburn, New York 13022



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

NEVIN MAWHIRNEY

PLAINTIFF

v.

Robert J. Henderson, Supt. A.C.F.

Peter Peiser Comm. Corp.

Morris Lt. A.C.F.

DEFENDANTS.

STATE OF NEW YORK )  
COUNTY OF CAYUGA )SS

APPLICATION TO PROCEED IN FORMA PAUPERI

*Verified Complaint:*

NEVIN MAWHIRNEY, being duly sworn deposes and says

1. ~~From~~ Jurisdiction to have and determine this complaint is founded on Title 28, U.S.C. Sections 1343 et seq., and Title 42 U.S.C. Sections 1981-1983.
2. Plaintiff herein was and is a citizen of these United States and does submit this verified complaint in support of his motion for: An injunction against  
The continued violation of plaintiff's civil rights and monetary gain, (\$1,000.00)  
and other relief.

- 3) Defendant Robert S. Henderson Superintendent was and is  
Superintendent Auburn Correctional Facility.
- 4) Defendant Peter Prieser Commissioner was and is  
Commissioner of Correctional Services
- 5) Defendant Norris Lt. was and is  
Lt. in charge of disciplinary proceedings, Auburn Corr. Facility.
- 6) On November 22, 1974, plaintiff was placed in seclusion.
- 7) On November 24, December 1, 1974, plaintiff was denied the right to see his attorney.

#### POINT TWO

Plaintiff was denied his Constitutional Rights to Freedom of Worship.  
and is  
Plaintiff was being denied his Constitutional rights to protection against cruel and unusual punishment. Plaintiff was and is being denied his constitutional rights to due process and equal protection of the law. If not restrained and enjoined by this Court, the illegal and unconstitutional actions of defendants alleged above will continue causing great and irreparable harm in that plaintiff will continue being deprived of



(2)

his rights to freely exercise his Religion - Due Process and Equal Protection

Plaintiff does not challenge the Constitutionality of the Rules and Regulations of the New York Department of Correction, he only seeks to enjoin Auburn Correctional officials from their application of such rules and regulations. The Procedure is at odds with due process.

Plaintiff is being denied his constitutional rights to attend his religious services. This denial being in violation of the First Amendment of the U.S. Constitution. The right to freely exercise his religion, due process and Equal Protection of the Law. And Protection against Cruel and Unusual Punishment

Defendants Henderson + Morris has an arbitrary procedure that denies all residents who are keeplocked and/or in punitive segregation, the right to attend religious services and/or any religious programs, without regard to the offence. If not restrained and enjoined by this court, the illegal and unconstitutional actions of defendants as alleged above will continue causing great and irreparable harm to plaintiff.

On the 13 day of November, 1974, plaintiff filed an Application pursuant to Article 78 of the Civil Practice Laws and Rules of New York State requesting aid, contending it constituted cruel and unusual punishment for Auburn officials to force inmates to stand out in foul weather for up to and exceeding one (1) hour in order to eat and the Auburn Correctional Facilities procedure of denying religious worship to all inmates kept locked without grounds. To the extent the inmate maybe kept locked for was in violation of the First Amendment to the Constitution of these United States. At the time of this filing, petitioner was so kept locked and denied.

On November 22, 1974, plaintiff was sent to solitary confinement as a form of harassment. Plaintiff for so long. Plaintiff in solitary prepared the within affidavit, plaintiff's exhibit and in, however, before same could be filed Judge Arthur Lewis Bigovelt denied the Article 78, on the 27<sup>th</sup> day of November, 1974, without settling the Constitutional questions and plaintiff received the notice of entry of said order on the 3<sup>rd</sup> day of December 1974.



(3)

Plaintiff has no adequate remedy at law in State Courts, wherefore plaintiff prays that this Court adjudge and declare the actions of defendants were and are unconstitutional, and to issue and order preliminary and permanently enjoining defendants their officers, agents and employees, etc., and all others acting in concert with them from obstructing plaintiff in his religious worship, socializing with the general population and utilizing unconstitutional disciplinary methods to deprive plaintiff of his civil rights and for such other and further relief as this Court may deem just and proper.

*When plaintiff requested due process (notification of the charge he was being punished for in writing and the right to call witnesses) to establish his innocence the Officer interviewing plaintiff said "Get the hell out of here." Such is the total disrespect defendants and their officers have for the rights of the General inmate population.*

*As Jesus Christ said "if the blind lead the blind they both shall fall into the ditch" How can those with total disregard to the supreme law of our land (the Constitution) teach others to be law abiding?*

*Wherefore plaintiff asks for injunctive relief and monetary gain at the discretion of this Court up to \$1,000.00.*



It is normal procedure at this facility when an inmate is placed in solitary he is interviewed weekly for evaluation. When plaintiff was so interviewed he was informed he would remain in solitary another week. Plaintiff then requested and was denied his rights as in *McDonnell v W. Va.* 485 F.2d 1054.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

NEWEL MAWHREY PLAINTIFF

V

Robert J. Henderson Supt. A.C.F.

John P. Ponder Assoc. Secy.

Woods Lt. A.C.F.

DEFENDANT(S)

X

MEMORANDUM OF LAW

X

POINTS AND AUTHORITIES

X

X

X

X

X

X

Plaintiff, who is an inmate of Auburn Correctional Facility is challenging the constitutionality of this Facility's disciplinary procedures. He maintains that the procedure as applied violates the Due Process and Equal Protection Clauses of the 14th Amendment and the Freedom of Religion Clause of the First Amendment and the Cruel and Unusual Punishment clause of the 8th Amendment of the Constitution of the U.S. and asks for injunctive relief.

Plaintiff does not seek release from his incarceration. He challenges the



Constitutional grounds of The Auburn Correctional Facility's disciplinary measures and procedures which result in sentences ranging from loss of privileges enjoyed by other inmates, to prolonged isolation from other inmates and the privileges enjoyed same and from minor infractions of plaintiff's rights-to outright barbaric and arbitrary infringement of rights guaranteed to plaintiff by the Constitution of the United States, all of which have a significant impact on the condition of his confinement and his alleged rehabilitation. There is no adequate state remedy that can dispose of this case without the necessity of reaching the Federal Questions raised (CP, Railroad Comm. V Pullman Co., (1941) 312 U.S. 496), and there is no saving constructions of the application of the disciplinary procedures that can be made to avoid the constitutional debility (See e.g., Chicago v A.T. and S.F. Railroad (1958) 357 U.S. 77). Even upon conviction and incarceration, inmates retain some of their basic constitutionally protected liberties. Serious intrusion on these liberties can be made only by following the requirements of due process. (CP Gagnon v Searpelli, (1973) 414 U.S. 778; Morrissey v Brewer (1972) 408 U.S. 471)

Accordingly six circuit Court of Appeals have held that prison disciplinary proceedings which can result in the imposition of significant sanctions must be accompanied by and conducted with due process safeguards (Palmigiana v Baxter, (1st Cir.) 465 F 2d 179; U.S. Ex Rel. Miller v Towney, (7th Cir.) 479 F 2d 701; McDonnell v Wolf (8th Cir.) 485 F 2d 1059).



(2)

In applying the "grievous loss" concept many things come into being in which deprivations are serious enough to require the application of due process such as denial of religious worship, possible increase in the period of imprisonment through the loss of good behavior time, forfeiture of earning capacity, segregated confinement for 7 or more days, indefinite confinement to segregation.

It would be difficult to imagine any punishment imposed by the Auburn disciplinary procedures that would not constitute any further impairment of an inmate's already restricted liberty. Additionally any entry on an inmate's file indicating ~~that~~ he has been placed in segregation has an unmeasurable adverse affect upon his parole eligibility. (See e.g. McDonnell v Wolf, Supra, at Pages 1064 and 1071; and Hudson v Hardy 424 F 2d 854, 856) which undoubtedly adversely affects an inmate's interest in liberty, even a temporary suspension of inmate activities constitute an abridgement of his already limited liberty. The distinction between a right and a privilege or between liberty or privilege is not more meaningless than from behind prison walls. (Sostre v McGinnis 442 F2d 178 page 196).

It is now axiomatic that the requisition of due process vary in accordance

with the specific factual contexts. If the N.Y.S. Parole Board must afford an inmate due process no less can be required of a State Facility Disciplinary Proceeding. (E.G. Morrissey v Brwer Supra.,) Security and Official custody of Inmates (Palmigrando v Baxter, Supra at page 1285) are interests that must be accorded but the state interest in temporary isolation of potentially disruptive inmates (Bragiarelli v Sielaff (3rd Cir.) 483 F 2d 508) and must predicate their action upon a good faith determination that immediate action is necessary and must be accomplished in a manner consistent with maintenance of Order, that is least restrictive of the inmate's rights and privileges.

Except in emergency situations an inmate's interest in preserving his self liberty and property and society's interest in rehabilitating him outweighs any competing interests that could be obtained by preserving the summary procedures found at Auburn's disciplinary proceedings.

RAC  
It is a ~~case~~ case indeed that will permit any prison official to deny an inmate his inherent right to attend and worship at religious services, the inmate may choose. (F.A.C.C. \_\_\_\_\_ 357 F. Supp. 877-88

This issue has been thoroughly evaluated in the many instances where State and Federal Prison Officials obstructed such worship. Defendants can not justify religious deprivation as due to placement in segregation.

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(2A)

not only because of the constitutional bar against such restrictions but because plaintiff placement in segregation is unconstitutional and unnecessary and his participation in religious services will do no harm to Facility order, or security and is not within the realm of a disciplinary proceeding to obstruct same.

In *N.Y.S. Association v Rockefeller* 357 F. Supp. 752, many aspects of conditions found of those confined were discussed. Among those basic standards of human decency was the right to exercise out of doors (*CF Hamilton v Schiro* 528 F. Supp. 1016, 1017).

The fitness of punishment is to be judged by applying evolving standards for the cruel and unusual punishment clause is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened to a human justice, *Weems v U.S.* 217 U.S. 349, 378, 30 S. Ct. 544. The rehabilitation goal is improved not impaired by imposing procedural protections for disciplinary proceedings designed to prevent arbitrariness and enhance the quality of the findings.

#### CONCLUSIONS

The temporary restraining order should be issued and a hearing ordered, to determine if a preliminary injunction shall issue and plaintiff shall be ordered restored to his pre-segregation status; permitted to participate in his religious services and to participate in the educational and rehabilitation program offered here at Auburn Correctional Facility without undue obstruction by further unconstitutional undue disciplinary proceedings.

*Sworn to before me And*  
DATED: this 10 day of January 19 75

*Dorothy J. Burns*

*/s/ Ben M. [unclear]*

DOROTHY J. BURNS  
Notary Public, State of New York  
No. 1482  
Qualified in Cayuga County  
Commission Expires March 30, 1976



AFFIDAVIT OF SERVICE

This is to certify that on this \_\_\_\_\_ day of January \_\_\_\_\_, 1975, I provided the undersigned Notary Republic with copies of all the within papers to be provided by for this Court for

The 3 defendants Robert J. Henderson, Peter Prieser and

Woods

The Office of the Attorney General of New York State at his Office at State Office Building, Albany, New York.

The Office of the Clerk of the United States District Court, Northern District of New York, Auburn, New York.

Sworn to before me this 10 day of January 1975

FILED  
U.S. DISTRICT COURT  
N.D. OF N.Y.  
AUBURN, N.Y.  
FEB 5 1975  
CLERK

Respectfully Submitted

Kevin Mahoney  
Kevin Mahoney  
135 State Street  
Auburn, New York 13022

Sworn Signature of:

Dorothy J. Burns  
NOTARY PUBLIC

DOROTHY J. BURNS  
Notary Public, State of New York  
No. 1432  
Qualified in Cayuga County  
Commission Expires March 30, 1976



## PLAINTIFF'S EXHIBIT TWO

(REASCHABLE FACSIMILE)

AT a Special Term of the Supreme Court of the County of Cayuga, held at the Court House in the City of Auburn, New York, on the 27th day of November, 1974

Present: Hon. Arthur Erwin Blauvelt  
Justice Supreme Court

State of New York

Supreme Court

Cayuga County

IN THE MATTER OF NEVIN PASBILANSKY,	X
Petitioner,	X
<del>-against-</del>	X
ROBERT J. HENDERSON, SUPERINTENDENT, Auburn Correctional Facility,	X
Respondent.	X
	X
	X

JUDGMENT  
INDEX NO. 74-1557

Upon reading and filing petitioner's petition, sworn to November 12, 1974, and an order in this Article 78 Proceeding directing respondent, to show cause why he should not be directed to rescind his order forbidding loitering under an archway leading into the institutional yard and to desist from disciplining inmates for violation of such an order, and due deliberation having been had, and the Court being satisfied that the application is without merit, and having read and filed its Memorandum, dated November, 27th, 1974, it is

ORDERED, ADJUDGED AND DECREED that the application be and the same hereby is denied and the proceeding dismissed.

/s/ ARTHUR ERWIN BLAUVELT  
Justice Supreme Court

SIGNED: December 3, 1974

ENTER:

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

75-8129  
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NEVIN MAWHINNEY,

Plaintiff,

v.

ROBERT J. HENDERSON, Supt. A.C.F.  
PETER PREISER, Comm. Corr.  
NORRIS, LT. A.C.F.,

Defendants.

75-CV- 97  
75-CV-

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Plaintiff is confined to Auburn Correctional Facility and submits this civil rights action claiming as its main thrust that when he is confined to segregation, he is not permitted to attend religious services and participate in educational programs.

Specifically, plaintiff alleges that he was confined to segregation on November 22, 1974, and was denied the right to go to church on November 24 and December 1, 1974. Plaintiff does not state that he was denied the right to attend religious services of his choice after he was released from segregation. His complaint relates solely to the refusal to permit him to attend church services while he was confined to segregation but not while he was in the general population.

Plaintiff also mentions on page 3 of his papers that he is being denied his rights under *McDonnell v. Wolff*, 483 F.2d 1059 (8th Cir. 1973). He claims that when he asked for the charges for which he was being held and the right to call witnesses the officer advised him to "Get the hell out of here". This assertion is not further developed by facts. See *Williams v. McMann*, 454 F.2d 1139 (2d Cir. 1972). The administrative procedures in 7 NYCRR 250 et seq. have been described as recognizing "both the demands of elementary fairness and the suitability of an impartial hearing". *U.S. ex rel Haymes v. Montayne*, \_\_\_\_ F.2d \_\_\_\_, 10/4/74. The Eighth Circuit



ruling in Wolff was modified in Wolff v. McDonnell, 418 U.S. 539 (1974).

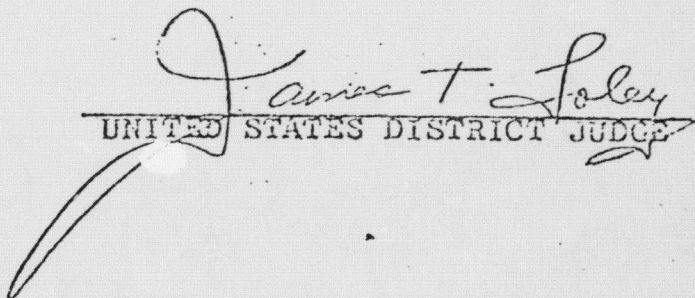
Confinement to segregation has been held to be constitutional Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), cert. den. 404 U.S. 1049 (1972). The denial of the right to worship while confined to segregation, in my judgment, does not constitute a denial of plaintiff's constitutional rights.

The complaint shall be filed by the Clerk without payment of fee and is dismissed for failure to state federal claims upon which relief can be granted.

It is so Ordered.

Dated: February 26, 1975

Albany, New York

  
UNITED STATES DISTRICT JUDGE



JUDGMENT ON DECISION BY THE COURT

CIV 32 (7-63)

## United States District Court

FOR THE

NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 75-CV-97

NEVIN MAWHINNEY,

Plaintiff

vs.

ROBERT J. HENDERSON, Supt. A.C.F.,  
PETER PREISER, Comm. Corr.  
NORRIS, LT., A.C.F.,

Defendants

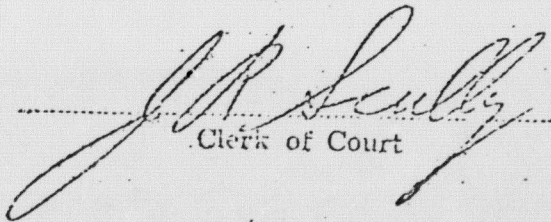
JUDGMENT

consideration  
This action came on for ~~trial~~ before the Court, Honorable James T. Foley,  
United States District Judge, presiding, and the issues having been duly ~~tried~~  
considered  
~~tried~~ and a decision having been duly rendered,

It is Ordered and Adjudged

complaint is dismissed.

Dated at Utica, New York, this 27th day  
of February, 1975.

  
Clerk of Court

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# United States Court of Appeals

FOR THE  
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at  
the United States Courthouse in the City of New York, on the 20th day of  
November, one thousand nine hundred and seventy-five.

Present:

HON. LEONARD P. MOORE  
HON. WILLIAM H. TIMBERS  
Circuit Judges  
HON. ALBERT W. COFFRIN,  
District Judge Sitting by Designation.

~~Circuit Judges~~

NEVIN MAWHINNEY,

Appellant,

v.

ROBERT J. HENDERSON, Superintendent,  
PETER PREISER, Commissioner of  
Corrections, and NORRIS, Lieutenant,

Appellees.

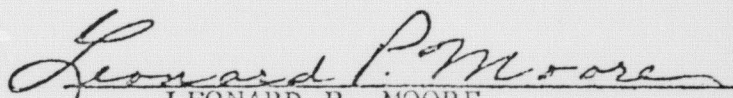
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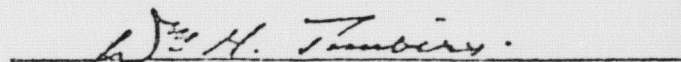
Appeal from the United States District Court for the Northern  
District of New York.

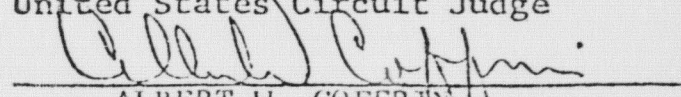
This cause came on to be heard on the transcript of record from the United States District Court  
for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that  
the appeal from the order of said District Court be, and it hereby is,  
dismissed for failure to file a timely notice of appeal; and it is

FURTHER ORDERED that the case be, and it hereby is, remanded to the  
district court for a determination on the issue of excusable neglect.

  
LEONARD P. MOORE  
United States Circuit Judge

  
WILLIAM H. TIMBERS  
United States Circuit Judge

  
ALBERT W. COFFRIN  
United States District Judge  
Sitting by Designation



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

---

NEVIN MAWHINNEY,

Plaintiff,

-against-

75-CV-97

ROBERT J. HENDERSON, Supt. A.C.F.  
PETER PREISER, Commissioner of  
Corrections, and NORRIS, Lieutenant,

Defendants.

---

APPEARANCES:

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New York State Department of Law  
Capitol  
Albany, New York 12224

OF COUNSEL:

ELLEN J. WINNER  
The Legal Aid Society  
Prisoners' Rights Project  
15 Park Row - 19th Floor  
New York, New York 10038

TIMOTHY F. O'BRIEN  
Assistant Attorney General

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

By memorandum-decision and order dated February 26, 1975, I dismissed a civil rights claim of this plaintiff. The complaint was drafted and submitted by him pro se when he was confined to Auburn Correctional Facility. A notice of appeal was also prepared pro se by the plaintiff from this dismissal and after being notarized and placed in the Facility channels for mailing was not received in the Clerk's office of this District Court at Utica until April 2, 1975. According to conceded time computations, this date of receipt was one day late for the effective filing of the notice of appeal. A Panel of the United States Court of Appeals, Circuit Judges Moore and Timbers, and District Judge Coffrin of the District of Vermont, by pro forma order dated November 20, 1975, dismissed the appeal for failure to file a



timely notice of appeal, but remanded the case to this District Court for a determination on the issue of excusable neglect. By formal motion, The Legal Aid Society, Prisoners' Rights Project, New York, New York, which represented the plaintiff on the appeal, move for an order pursuant to Federal Rule of Appellate Procedure 4(a), extending the time for filing the notice of appeal until April 2, 1975, which would overcome the one-day late barrier to timely filing of the appeal. There has been filed an affidavit by the Attorney General's Office in opposition, and the motion was submitted for decision on these papers with a memorandum of law for the plaintiff on February 3, 1976, without oral argument.

The basis for the request that the time be extended to validate the notice of appeal is the "excusable neglect" provision of Rule 4(a) of the Federal Rules of Appellate Procedure. I have no

difficulty whatsoever in finding excusable neglect in this situation. I have been of the attitude from the beginning of my career as a federal judge that rigid and technical procedural rules should not be invoked against persons in confinement unless there is a flagrant, reckless and knowledgeable disregard of them. In a civil case when it seemed unfair to be too rigid in appeal requirements, my state of mind was the same. See Parissi v. Telechron, Inc., 349 U.S. 46 (1955). Of course, through the years, I was indoctrinated further that this approach was the proper one by the liberal writings of the federal appellate courts, including the United States Supreme Court, that applications and complaints of state prisoners must be accorded the most liberal consideration. The memorandum of law filed for the plaintiff set forth numerous cases in the federal courts in support of this concept.

I find the incarceration of the plaintiff caused the one-day delay. I accept his statement that he believed the notice of appeal had to be notarized because I know from long experience that



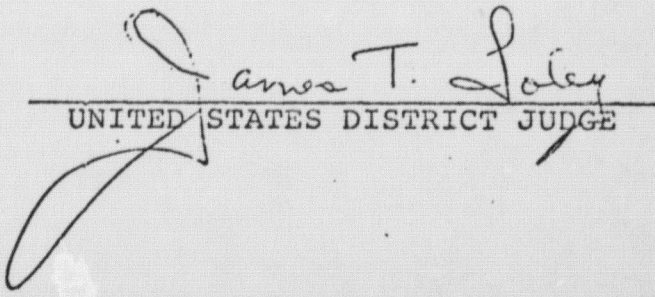
the State prisoners have every type of their writings to the courts notarized. I find that the plaintiff in good faith awaited the services of the Notary Public and on March 28, 1975, gave the notice of appeal to the Notary for mailing. I find that the plaintiff completed the preparation and submission of the notice of appeal, to the full extent his imprisonment allowed, on March 28, 1975, four days before it had to be filed in the Clerk's office on April 1, 1975. I find the receipt of the notice of appeal in that office one-day late on April 2, 1975, was caused by no fault of the plaintiff, and, unquestionably, there is present excusable neglect that warrants the grant of the motion to extend the time for filing the notice of appeal to April 2, 1975.

The motion is granted. The Clerk of this District Court shall note the appeal as timely filed as of April 2, 1975, and a copy of this decision and the entire file shall be forwarded by the Clerk of this District Court to the Clerk of the Court of Appeals, Second Circuit, for further consideration.

It is so Ordered.

DATED: February 4, 1976

Albany, New York

  
UNITED STATES DISTRICT JUDGE